STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

On Appeal From The Court Of Appeals
The Honorable Patrick M. Meter, The Honorable
Karen M. Fort Hood, And The Honorable Bill Schuette, Presiding

THE GREATER BIBLE WAY TEMPLE OF JACKSON, a Michigan ecclesiastical corporation,

Plaintiff/Appellee,

vs.

CITY OF JACKSON, JACKSON PLANNING COMMISSION, and JACKSON CITY COUNCIL

Defendants/Appellants.
_____/

Supreme Court No. 130194
Court of Appeal No. 250863
Lower Court No. 01-003614-AS

SECREST WARDLE

REPLY BRIEF OF APPELLANT CITY OF JACKSON

ORAL ARGUMENT REQUESTED

Respectfully submitted,

SECREST WARDLE
GERALD A. FISHER (P13462)
Consultant to the Firm
THOMAS R. SCHULTZ (P42111)
SHANNON K. OZGA (P59093)
Attorneys for City of Jackson
30903 Northwestern Highway
Farmington Hills, MI 4834
(248) 851-9500

OFFICES OF JACKSON CITY ATTORNEY
JULIUS A. GIGLIO (P32022)
Jackson City Attorney
SUSAN G. MURPHY (P49341)
Deputy City Attorney
Co-Counsel for City of Jackson
161 W. Michigan Avenue
Jackson, MI 49201
(517) 788-4050

Dated: September 5, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REPLY TO COUNTER-STATEMENT OF FACTS 1

ARGUMENT 3

1. GBW Cites No Authority Upon Which the Court Could Find the City's Legislative Denial of Re-Zoning to be an Individualized Assessment Under RLUIPA 3

2. GBW Fails to Prove that its Proposed Use is the Exercise of Religion or that Such Exercise was Substantially Burdened by the City's Zoning Ordinance 6

3. GBW Fails to Establish that the Protection of Single-Family Neighborhoods is not a Compelling Governmental Interest 8

4. GBW Misses the Point of the City's Constitutionality Argument 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page(s)**

Civil Liberties for Urban Believers v City of Chicago,
342 F3d 752 (CA 7, 2003)..... 7

Cottonwood Christian Center v City of Cypress,
218 F Supp 2d 1203 (CD Cal, 2002)..... 3

Guru Nanak Sikh Society of Yuba City v County of Sutter,
456 F3d 978 (9th Cir, 2006)..... 3

Jesus Center v Farmington Hills,
215 Mich App 54; 544 NW2d 698 (1996)..... 6,7

Kirk v Tyrone Township,
398 Mich 429; 247 NW2d 848 (1976)..... 4

Padover v Farmington Township,
374 Mich 622; 132 NW2d 687 (1965)..... 1

Schwartz v City of Flint,
426 Mich 295; 395 NW2d 678 (1986)..... 4

Shepherd Montessori Center v Milan,
259 Mich App 315; 675 NW2d 271 (2003)..... 7

Statutes

MCL 125.585(11)..... 5

42 USC 2000cc 2(a)(2)(C)..... 5

INTRODUCTION

GBW's Brief on Appeal holds firm to its contentions that, under RLUIPA, the exercise of religion includes **any** proposed use of land within the contemplation of a religious entity's "mission," and that a substantial burden on religious exercise necessarily results from **any** decision that prevents such proposed use, regardless of its equal impact on nonreligious uses and users. Because it continues to deny or ignore the historical and legal context of RLUIPA and the need to interpret its broad terms within a constitutional framework, GBW's analysis, like that of the lower courts, extends well beyond the intent of RLUIPA, which seeks to level, rather than upset the playing field between religious and nonreligious uses and users.

GBW's reading of RLUIPA eviscerates the legal respect afforded to legislative policy-making. A request for rezoning seeks a legislative determination. The usual deferential review of a local government's decision on the enactment of legislation—including a decision not to amend legislation—simply cannot be ignored. To do so would require the government—both the legislative and judicial branches—to disregard legal norms that consistently apply to all other property owners. This Court has clarified that it will not consider the "wisdom or desirability" of a zoning restriction.[1] Reading RLUIPA to ignore the deferential review of legislation exclusively for church requests would contradict solid Michigan precedent and would defeat, rather than fulfill the Constitution's commitment to religious neutrality and toleration.

REPLY TO COUNTER-STATEMENT OF FACTS

The City will not engage in a shouting match over the presentation of the facts below, since the record speaks for itself. However, there are a few inconsistencies in GBW's recitation that extend to the heart of the case and thus should be brought to the Court's attention.

---

[1] *Padover v Farmington Twp,* 374 Mich 622, 635; 132 NW2d 687 (1965).

First, the significance of the apartment project to GBW's viability as a church. On the very first page of its Counter-Statement of Facts, GBW ominously declares that nothing less than its "rights to survive . . . hang in the balance of the case." [2] Undoubtedly intended to bolster the claim of "substantial burden," this statement is completely belied by GBW's candid admission offered just a few pages later that "Initially, Greater Bible intended to use the land as a parking lot for its new church facilities."[3] This admission shows GBW's proposal to use the property for a 32-unit multiple-family apartment complex for what it really is—an **afterthought**.

Next is the nature of the use contemplated by GBW and authorized by the trial court. GBW repeatedly refers—more than a dozen times in 15 pages—to its "**elderly housing**" proposal, attempting to convey the impression that the final order in this case is restricted to an authorization for that type of housing. Based on the firm position taken by GBW in the proceedings below that its use should not be limited in any way, the final order that is the subject of this appeal simply authorizes GBW to develop a 32-unit apartment complex on the property comporting with the R-3 (multiple-family) classification of the Jackson zoning ordinance. GBW is **not** limited to using its property for elderly housing or any other religious or charitable use, or from conveying it to someone else for a commercial apartment use once the new zoning classification is in place—nor more importantly, did it ask the City for anything less than a standard R-3 zoning classification.

Finally, GBW's characterization of the property. GBW takes issue with the City's description of the general location of the property in relation to other existing uses and of the nature of the surrounding existing uses, factors that formed the basis for the City's denial of GBW's rezoning application. GBW makes the fairly remarkable assertions that the subdivision lots in question are situated on two "major streets," and are located on the "extreme edge of single-family

[2] GBW's Brief on Appeal, p 4.
[3] GBW's Brief on Appeal, p 7.

housing."[4] These assertions are not merely unsubstantiated by the lower court record, they are soundly contradicted by the clear testimony and evidence below. As clarified in the City's principal brief,[5] and as shown on an aerial photo admitted at trial,[6] the subdivision lots are indeed situated squarely within a cohesive, established single-family residential neighborhood, on "neighborhood streets" in which children often play and that are "just not designed for higher volumes of traffic . . . it's not an area that's conducive for higher density development."[7]

ARGUMENT

1. GBW Cites No Authority Upon Which the Court Could Find the City's Legislative Denial of Re-Zoning to be an Individualized Assessment Under RLUIPA

GBW cites two federal court cases from California in support of the generic argument that (apparently all) zoning decisions made by a city represent "individualized assessments."[8] What GBW fails to inform the Court, however, is that these cases involved a city's denial of an **administratively-approved conditional use permit**, not a request for a **legislatively-determined rezoning.** The City in this case does not contest that a local government's action on a conditional use permit, which is clearly an administrative decision, amounts to a case-by-case, individualized assessment. But that kind of decision-making is factually and legally distinct from the policy-making action of a city council associated with the establishment of an entire zoning use district, and from subsequent reviews made with regard to land within such districts upon applications for rezoning.

[4] GBW's Brief on Appeal, pp 6-7 and p 21.
[5] *Guru Nanak Sikh Society of Yuba City v County of Sutter*, 456 F3d 978 (9th Cir, 2006) and *Cottonwood Christian Center v City of Cypress*, 218 F Supp 2d 1203 (CD Cal, 2002), City's Brief on Appeal, p 8.
[6] Appellant's Appendix 948a.
[7] Testimony of Mr. Reisdorf, Regional Planner, Appellant's Appendix, 508a.
[8] GBW's Brief on Appeal, pp 23-24.

Zoning use district decisions are made after lengthy public hearings on the city-wide comprehensive plan, followed by further hearings on the zoning map of the city. This Court has characterized the nature of the policy decisions required in the zoning process:

> Zoning, by its nature, is most uniquely suited to the exercise of the police power because of the **value judgments** that must be made regarding aesthetics, economics, transportation, health, safety, and a community's aspirations and values in general. (Emphasis supplied).[9]

Thus, GBW's citation to these conditional use permit cases fails to support its argument that an individualized assessment has been made in this rezoning case.

GBW also attempts to compare a **rezoning** with a **use variance approval.** In fact, a side-by-side analysis of these two processes aids in the recognition of the critical legal distinction between legislative and administrative decisions. This analysis starts with the standard of judicial review applicable when an aggrieved party seeks relief from a denial. As discussed at greater length in the City's principal brief,[10] Michigan jurisprudence directs that a property owner must challenge the application of whatever is the current legislatively-established zoning classification—a classification generally authorizing several permitted uses applicable throughout the entire district. A plaintiff must plead and prove that the **existing zoning** fails to afford a reasonable use of the land.[11] The merits of the denial itself are not at issue, and the focus of the inquiry is neither the party seeking relief nor any specific use that might be desired. As pointed out in *Schwartz*, considering the establishment **and alteration** of a use district involves a wide set of *value judgments* in the formulation of city policy for the area at issue, as such area will impact upon—and be impacted by—the balance of the city. This inquiry is not the stuff of a RLUIPA review.

[9] *Schwartz v City of Flint,* 426 Mich 295, 313; 395 NW2d 678 (1986).
[10] City's Brief on Appeal, p 26.
[11] *Kirk v Tyrone Twp,* 398 Mich 429; 247 NW2d 848 (1976).

This is quite distinct from a challenge brought in the face of an administratively-denied use variance. There, the focus of the inquiry is upon the very specific use sought, and the individualized action of denial. Specifically, by statute applicable at the time of trial: [12]

> The decision of the board of appeals is final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to ensure that the decision meets all of the following requirements:
>
> (a) Complies with the constitution and laws of this state.
> (b) Is based upon proper procedure.
> (c) Is supported by competent, material, and substantial evidence on the record.
> (d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

Thus, the challenge and judicial review following the denial of a use variance are based upon an analysis probing why the individualized relief sought by the particular party for a specific, identified use was administratively denied. This, then, is precisely the nature of a RLUIPA review.

RLUIPA applies to "individualized assessments ***of the proposed uses for the property involved***."[13] There can be no mistaking the policy-making action required in a rezoning of a property—which is the legislative product of broad policy analysis—for an administrative assessment of a specific proposed use. Unlike any of the administrative decisions that can be made in the context of land use regulation, the approval of a zoning use district approves an array of uses for an entire area, including the property affected, religious and nonreligious alike. It cannot logically—or fairly—be judged merely on the basis of its effect on the proposed use of a single user, religious or otherwise.

[12] MCL 125.585(11)
[13] 42 USC 2000cc 2(a)(2)(C).

2. GBW Fails to Prove that its Proposed Use is the Exercise of Religion or that Such Exercise was Substantially Burdened by the City's Zoning Ordinance

GBW suggests that the City is raising the question whether GBW's proposed apartment complex is actually an exercise of religion entitled to protection under RLUIPA for the first time on appeal to this Court. GBW refers to the trial court's February 25, 2003 opinion and order, which states that the City "does not question the religious mission of the plaintiff in any way."[14] Aside from the obvious fact that the City's appeal is from that very opinion and order, whether or not the City acknowledged in the trial court that providing housing or any other service is part of GBW's "mission" has nothing to do with the question whether it is the exercise of religion for purposes of RLUIPA. It may indeed be GBW's hope, desire, or mission to provide for-profit, for-rent multiple-family housing; that does not, however, permit such activity to be specially privileged as a religious exercise and exempted from facially-neutral zoning regulations.

On the substantive question whether the City's denial of the rezoning constituted a substantial burden on GBW's religious exercise, GBW again relies primarily on the *Jesus Center* v *Farmington Hills* case, [15] which, as pointed out by the City in its principal brief, was decided under the Religious Freedom Restoration Act (RFRA), since held to be unconstitutional. GBW's fixation on the case stems from its characterization of the City's denial of the proposed rezoning as akin to telling GBW to "move out of town," which is how the *Jesus Center* court framed the action in that case. But the City said no such thing here.

Unlike in the *Jesus Center* case, which involved a shelter for the homeless in connection with an established worship structure, the record below reflects no hostility to the church, or its members, or the potential "clients" of a housing development. Unlike the *Jesus Center* case, no specific, identifiable use of the property was before the City for approval; the only question was what the

[14] Appellant's Appendix, pp 378a-382a.

legislative zoning classification for the property ought to be. And unlike the *Jesus Center's* ministrations to persons in need as an accessory use to its principal religious worship center use, GBW's rezoning request contemplated the possible construction of a new facility on the property in question. The *Jesus Center* case could hardly be more distinguishable.

GBW points this Court to no cases that are even remotely similar factually or legally—not one that involves the adoption of actual legislation, not one that contemplates the construction in a single-family neighborhood of an apartment complex that would support a nonreligious use just as easily as a religious or charitable use. GBW can only argue that it presented "uncontroverted proof" that it would not be able to build an elderly/disabled housing project on any other piece of property, that it would suffer an economic burden if it could not build the use it wanted on the property, and that it would face an economic burden if it had to use the property for the construction of single-family homes.

GBW distorts the nature of the "substantial burden" test. A substantial burden is one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."[16] A government regulation does not substantially burden religious activity "when it only has an incidental effect that makes it more difficult to practice the religion."[17] Mere inconvenience to the religious institution or adherent is insufficient.[18]

GBW has acknowledged that it originally assembled the property in order to build a parking lot, so the assertion that its ability to fulfill its religious mission is prevented by the City's refusal to

[15] 215 Mich App 54; 544 NW2d 698 (1996).
[16] *Civil Liberties for Urban Believers v City of Chicago,* 342 F3d 752, 760-61 (CA 7, 2003).
[17] *Shepherd Montessori Center v Milan*, 259 Mich App 315, 330; 675 NW2d 271 (2003).
[18] *Id.*

rezone the property is demonstrably unfounded. The fact that GBW never formally limited itself to an elderly/disabled housing project of a particular number of units further discredits that contention.

GBW effectively asserts that the City is somehow obligated under RLUIPA to act as a kind of guarantor of the success of GBW's real estate ventures, protecting GBW from having to enter into the marketplace to compete for properly planned and zoned properties. This is nothing more than a demand for the outright waiver of otherwise facially-neutral land use regulations with regard to an owner of property that happens to be a religious entity. The substantial burden test does not extend that far, as the cases cited in the City's principal brief establish.[19]

3. GBW Fails to Establish that the Protection of Single-Family Neighborhoods is not a Compelling Governmental Interest

GBW essentially contends that in the face of a Free Exercise/Establishment Clause challenge, a mere zoning law can **never** be sustained as furthering a compelling governmental interest. As further discussed in the City's principal brief, this argument is inapt as it relates to GBW's proposed use in this case. GBW's use is not a worship center; it is an apartment complex. A building in Jackson's R-3 zoning district can be 45 feet tall. By securing R-3 zoning, GBW, or some nonreligious successor, could establish a for-rent/for-profit multiple-family use entirely unrelated to elderly housing. GBW cannot be serious in asserting that the City's concerns with regard to R-3 uses are "unfounded and irrational."

GBW suggests that the City's denial of the rezoning was not the "least restrictive" manner in which it could have dealt with its concerns. This contention ignores the fact that the **only** question before the City Council was the request to rezone the property from a single-family use to the R-3 district. That request had nothing to do with some specific land use—it did not involve a site plan approval, or a request for a use variance, or a proposed plan unit development (PUD). It asked only

[19] City's Brief on Appeal, pp 33-40.

for the proposed zoning legislation. The denial was thus not just the least restrictive means by which the City could address the inappropriateness of the proposed legislative classification; it was the **only** means by which the City could do so.

4. GBW Misses the Point of the City's Constitutionality Argument

GBW suggests that the constitutional issues raised in the City's principal brief were somehow waived by the City's failure to attack RLUIPA as unconstitutional in the circuit court. GBW misses the point of the City's argument. It is entirely possible for RLUIPA to be construed and applied to this and any other case in a constitutional manner. ***As applied*** by the lower courts, however, RLUIPA must be found to be unconstitutional.

GBW s assertion that RLUIPA is a permissible regulation under Section 5 of the Fourteenth Amendment because it is congruent and proportional to the "injury to be prevented" ignores the fact that there **was no injury** to GBW's rights to exercise religion on these facts. If RLUIPA can be read so expansively as to require a legislative body to rezone single-family property to an apartment use just because the proponent of the rezoning is a church then it is neither of those things.

GBW ignores the same flaw in addressing the City's Establishment Clause argument. There can be no secular purpose to RLUIPA if its effect is to fundamentally change the manner in which the courts of this state review the denial of a rezoning application **only for religious uses**. The denial of the rezoning request at issue for a nonreligious user would involve only a review of whether the existing single-family zoning classification furthers legitimate governmental interests and permits a reasonable economic return. If RLUIPA is read to alter that inquiry to nothing more than an inquiry whether GBW is allowed to do whatever it wants to do on the property, there is no secular benefit to RLUIPA. Such a reading would also "advance" religion or religious uses over nonreligion or nonreligious uses. An alteration of the fundamental nature of a zoning review with

respect to religious uses or users is not an accommodation; it is a **waiver** that constitutes impermissible governmental support for and involvement in religion.

CONCLUSION

GBW's Brief on Appeal, like the lower courts' rulings, fails to acknowledge that GBW's application for legislative action required the City to evaluate not just GBW's "proposed" use, but every other possible use and user, religious or not, permitted in the proposed R-3 district. This called for a broad policy-based decision taking into consideration an entire zoning use district—the opposite of an individualized assessment of a specific proposed use.

GBW essentially argues that the City should have ignored any other uses and users because the denial of the rezoning would prevent GBW's presumed development—that the City should have ignored the fact that GBW could construct and lease a private apartment complex or sell the building to a non-religious entity at any time; that, if it did so, the adjacent single-family homeowners would find no solace in the fact that the building was once owned by a church; and that the existence of an apartment building in its proposed location would, in the opinion of the City's planners and City Council, inflict harm on the surrounding neighborhood and the City generally. What it asks for is a flat-out exemption from decades old zoning law jurisprudence merely because it is a religious entity. Such an exemption is precluded under the First Amendment just as discrimination against GBW would be.

SECREST WARDLE

BY: _____
GERALD A. FISHER (P13462)
Consultant to the Firm

SECREST WARDLE

BY: _____
THOMAS R. SCHULTZ (P42111)

OFFICES OF JACKSON CITY ATTORNEY

BY: _____
SUSAN G. MURPHY (P49341)

Dated: September 5, 2006